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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY ELLSWOOD,

Defendant and Appellant.

C067060

(Super. Ct. No.
10F01920)

A jury found defendant Jeremy Ellswood guilty of inflicting corporal injury on his cohabitant Sierra Rodriquez. (Pen. Code, § 273.5, subd. (a).)¹ Sentenced to three years in state prison, he appeals, contending (1) there is insufficient evidence he cohabitated with Rodriquez as required under section 273.5,

¹ Further undesignated section references are to the Penal Code.

subdivision (a), and (2) the trial court abused its discretion and violated his constitutional right to confront witnesses against him in refusing to allow him to cross-examine Rodriguez concerning a charge pending against her in an unrelated federal case. We shall conclude sufficient evidence supports defendant's conviction, and the trial court properly excluded evidence concerning the pending federal charge. Accordingly, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Rodriguez dated for approximately three months. During that time, Rodriguez spent virtually every night at defendant's condominium. She showered there each night and kept articles of clothing and other personal items there. She purchased a washer and dryer for the condominium. Defendant's next door neighbor saw Rodriguez at defendant's condominium two or three times a week over a two month period. Defendant told his mother Rodriguez was his girlfriend. When applying for work projects in February and March 2010, defendant listed Rodriguez as his emergency contact person and listed her address as the same as his home address. Rodriguez testified that she "live[d]" with her mother, explaining that she kept her bed and most of her belongings at her mother's house.

On March 19, 2010, defendant, Rodriguez, and others were drinking at a friend's apartment. Defendant drove Rodriguez and two others back to his condominium in Rodriguez's car. Defendant and Rodriguez got into an argument, and Rodriguez

gathered up her belongings and left. Rodriguez returned to defendant's condominium later that evening to spend the night. She put on one of defendant's t-shirts and climbed into his bed. At some point, she discovered defendant had been texting his ex-girlfriend, and an argument ensued. When defendant saw Rodriguez in his bed, he asked, "why are you even here," and attempted to rip his t-shirt off of her. As she was about to leave, defendant threw her to the ground, got on top of her, and placed his hand over her mouth and nose. She could not breathe and pushed defendant off of her. When her nose began to bleed, defendant pushed her into the bathroom and told her to clean herself up. When defendant went upstairs to get a towel, Rodriguez ran outside and called for help. Defendant's next door neighbors, Octavian and Tracy Han, heard Rodriguez screaming, and when Mr. Han opened the door, he saw her bleeding and crying. When defendant ran after her, Mr. Han wrestled him to the ground while Mrs. Han telephoned 911.

Deputies with the Sacramento Sheriff's Department responded, and defendant was arrested. He remained in custody continuously since that time. When defendant was arrested, the police gave Rodriguez his belongings, including his wallet and keys. Defendant's wallet contained \$90 in cash, and his Automated Teller Machine (ATM) and Electronic Benefit Transfer (EBT) cards.

Following defendant's arrest and while he was in custody, most of his furniture was removed from his condominium, his ATM

and EBT cards were used to withdraw money and purchase items from the WinCo Food store where Rodriguez worked, and someone with access to his mail cashed his student loan check. Rodriguez denied using defendant's ATM card to deposit his student loan check and withdraw money and did not recall using his EBT card to make purchases at WinCo or to obtain money from his account, although she acknowledged possessing the cards and defendant's keys at the time the check was cashed and the purchases and withdrawals were made.

Defendant testified in his own defense. He denied Rodriguez was his girlfriend or that she ever lived with him. Rather, he had an on and off relationship with his former girlfriend and was seeing Rodriguez on the side. Rodriguez spent the night at his condominium approximately 15 times during the time they were seeing each other. She "had absolutely nothing at [his] house," except some hygiene products like shampoo. The lease and the utilities were in defendant's name, and defendant never gave Rodriguez a key to the condominium.

Defendant denied throwing Rodriguez to the ground or attempting to suffocate her. Rather, she was drunk, refused to leave his condominium, and pushed and punched him in the face. When he attempted to hold her arms, he fell down on top of her; and when he attempted to get up, he inadvertently grabbed her face. He did not intend to hurt or smother her.

He never authorized Rodriguez to use his EBT or ATM cards.

DISCUSSION

I

There Was Sufficient Evidence Defendant Cohabitated with Rodriguez

Defendant contends there is insufficient evidence he and Rodriguez were cohabitants as required under section 273.5, subdivision (a). We disagree.

Section 273.5, subdivision (a) provides in pertinent part that any person who willfully inflicts "corporal injury resulting in a traumatic condition" upon a "cohabitant" or "former cohabitant" is guilty of a felony. "The cases addressing the cohabitation element of section 273.5 'have interpreted it broadly, refusing to impose any requirement of a "quasi-marital relationship.'" [Citation.] For purposes of section 273.5, the term 'cohabitant' 'requires something more than a platonic, rooming-house arrangement.' [Citation.] It refers to an unrelated couple 'living together in a substantial relationship—one manifested, minimally, by permanence and sexual or amorous intimacy.' [Citation.]" (*People v. Belton* (2008) 168 Cal.App.4th 432, 437-438 [*Belton*].) "Permanence does not require exclusivity in either the relationship or the living arrangement." (*People v. Taylor* (2004) 118 Cal.App.4th 11, 19 [*Taylor*].)

"In reviewing a challenge to the sufficiency of the evidence, we examine the record in the light most favorable to the judgment to see if it contains reasonable, solid evidence from which a reasonable trier of fact could find the defendant

guilty beyond a reasonable doubt. [Citation.]" (*Belton, supra*, 168 Cal.App.4th at p. 437.)

Here, the record discloses that defendant and Rodriguez dated for approximately three months, during which time Rodriguez slept at defendant's condominium virtually every night. She kept clothing and other personal items there and purchased a washer and dryer for the condominium. Courts, including this one, have upheld juries' findings of cohabitation on weaker facts. (See *Belton, supra*, 168 Cal.App.4th at pp. 435-436, 438 [victim lived with defendant in various locations, including the victim's rented room, motels, other people's homes, and a car, for some unspecified portion of their two-month relationship that ended prior to the offenses]; *Taylor, supra*, 118 Cal.App.4th at pp. 17, 19 [defendant and victim had dated for about five months and, during that time, victim had lived in defendant's car "for periods of time when she was homeless and had no other place to stay" and they spent the night before the charged crimes in defendant's car]; *People v. Holifield* (1988) 205 Cal.App.3d 993, 995-996, 1002 [defendant lived with victim in her rented motel room "half or more of the three months preceding the assault"].)

Contrary to defendant's suggestion, Rodriguez's testimony that she "live[d]" with her mother did not preclude the jury from finding that she cohabitated with defendant. Exclusivity in the living arrangement is not required. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1334-1335 [*Moore*].) Moreover,

Rodriguez qualified her statement by explaining that her bed and most of her belongings were at her mother's house; however, she slept at defendant's condominium every night.

In addition, the prosecution was not required to show defendant and Rodriguez engaged in sexual relations to establish they cohabitated, as defendant appears to suggest. While that is a factor the jury may consider in determining whether the cohabitation element is met, it is not a requirement.

(*Holifield, supra*, 205 Cal.App.3d at p. 1001.) "[A]morous intimacy" is sufficient. (*Taylor, supra*, 118 Cal.App.4th at p. 19; see also *Moore, supra*, 44 Cal.App.4th at p. 1333.) Rodriguez's description of the relationship as boyfriend-girlfriend, defendant's reference to Rodriguez as his girlfriend, and Rodriguez's reaction upon learning defendant had been communicating with another woman "show[ed] an intimacy going well beyond that of ordinary roommates." (*Holifield, supra*, 205 Cal.App.3d at p. 1002.)

We find substantial evidence supports the jury's finding that defendant cohabitated with Rodriguez.

II

The Trial Court Properly Excluded Evidence That Rodriguez Had Been Charged With Obstruction Of Justice in an Unrelated Federal Case

Defendant also contends the trial court erred in refusing to allow him to cross-examine Rodriguez regarding an obstruction of justice charge pending against her in an unrelated federal case. In that case, Rodriguez was alleged to have refused to

turn over a laptop involved in a purported child prostitution ring and to have lied to the FBI about it. Defendant asserts that excluding such evidence violated his right under the state and federal Constitutions to confront witnesses against him (see U.S. Const. 6th & 14th Amends.; Cal. Const., art. I, § 15) and was an abuse of the trial court's discretion under Evidence Code section 352. We disagree.

The prosecution moved in limine to preclude defendant from mentioning the pending charge on the grounds, among others, that Rodriguez had not been convicted of the offense, "[e]fforts to inquire of the arrest will likely lead to further questions and uncertainty," and "[s]uch evidence would have minimal probative value while consuming an undue amount of time." Defendant opposed the motion, arguing such evidence was relevant to Rodriguez's character for veracity. The prosecutor responded that he had been advised by Rodriguez's attorney in the federal case that Rodriguez had initially lied to federal agents about possessing the laptop because she had been threatened by the person that gave it to her; thus giving rise to a duress defense. Shortly thereafter, she turned over the laptop and was cooperating with the FBI.

The trial court excluded evidence concerning the pending federal case, finding that the evidence's marginal relevance was outweighed by the time it would consume (see Evid. Code, § 352). The court explained that "at this point, there are reports; there is an investigation and there is no conviction. So we

would be truly getting into a mini-trial without her having the benefit of a defendant on trial." The court rejected defendant's assertion that Rodriguez's concern over the pending federal charge may have contributed to her willingness to provide testimony favorable to the prosecution in the instant case.

Later, defendant sought to introduce evidence that Rodriguez gave her mother's address, as opposed to defendant's, to the federal probation department, which supervised her release in the pending federal case. The prosecution objected, arguing that such evidence was encompassed in the trial court's earlier ruling excluding evidence concerning the pending federal case. The trial court ruled that defendant could ask Rodriguez whether she gave probation her mother's address "and leave it at that." The court refused to allow defendant to ask Rodriguez whether the probation officer visited her at her mother's home, noting that it had already determined that such evidence was excluded.

"Although the right of confrontation includes the right to cross-examine adverse witnesses on matters reflecting on their credibility, 'trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination.' [Citation.] In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.] A trial

court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted. [Citation.]” (*People v. Quartermain* (1997) 16 Cal.4th 600, 623-624 [*Quartermain*].)

“Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time.” (Evid. Code, § 352; *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124.)

Here, Rodriguez had not been convicted of the federal offense -- rather, the charge against her was pending. The evidence before the trial court was that if defendant had been allowed to cross-examine Rodriguez as to whether she withheld the laptop and lied to the FBI about it (and assuming she did not invoke her right to remain silent), Rodriguez would have testified that she did so because she was threatened by the person who gave her the laptop. Thus, an issue would have arisen as to whether Rodriguez had a defense to the charge. Moreover, Rodriguez had turned over the laptop and was cooperating with the FBI. On this record, the trial court acted well within its discretion in determining that the evidence's marginal relevance was outweighed by the amount of time it would consume.

Relying on *People v. Coyer* (1983) 142 Cal.App.3d 839 (Coyer), defendant argues the pendency of the federal charge was relevant to her motivation for testifying in the present case. As we shall explain, Coyer is distinguishable.

In that case, the court held "that a defendant is entitled to *discovery* of criminal charges currently pending against prosecution witnesses anywhere in the state[]" because "the pendency of criminal charges is material to a witness' motivation in testifying even where no express 'promises of leniency or immunity' have been made." (Coyer, *supra*, 142 Cal.App.3d at p. 842, italics added.) The court explained that "[d]uring trial, defense counsel 'is permitted to inquire whether charges are pending against a witness as a circumstance tending to show that the witness may be seeking leniency through testifying'" and noted that there is no requirement that a witness' motive to fabricate have a basis for its existence. (*Id.* at p. 843.) Rather, "it is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative[.]" (*Ibid.*) Thus, the court reasoned that while, as a factual matter, the district attorney's office of one county is autonomous from its counterparts in other counties, "an individual subject to criminal or quasi-criminal proceedings of any sort may perceive all these entities as forming a single law enforcement establishment." (*Ibid.*)

There was no such danger here. As the trial court observed, "[i]n this case, we have a pending *federal* charge, not a charge from another county or from the State of California or through the attorney general's office. [¶] We do not run into the problem of a witness confusing the two entities, as she is represented by an attorney, who would certainly apprise her of the fact that her testimony in this case would help her in the unrelated matter, if that in fact were the case." (Italics added.) Having reviewed the pending charge and the circumstances surrounding it, the trial court found it had no "connection with this matter" such that Rodriguez "testifying favorably [in this case] would have any impact on the federal case." We agree.

Where, unlike *Coyer*, there was no reasonable basis for Rodriguez to believe that her testimony in this case would impact the outcome of the pending federal case, the trial court acted well within its discretion in precluding defendant from cross-examining Rodriguez concerning the pending charge.

As for defendant's assertion that the exclusion of such evidence violated the Confrontation Clause, we cannot say that reasonable jurors might have received a significantly different impression of Rodriguez's credibility if defendant had been permitted to impeach her with evidence regarding the pending federal case where it was undisputed that she eventually turned over the computer and was cooperating with the FBI, and defendant was permitted to introduce other evidence concerning

Rodriguez's reputation for truthfulness. (See *People v. Quartermain, supra*, 16 Cal.4th at p. 624.) Specifically, defendant was permitted to impeach Rodriguez's credibility with evidence that, at the time of the incident, she was angry at defendant for communicating with his former girlfriend, and thus, had a motive to lie about what had happened. He was also permitted to impeach Rodriguez's credibility with evidence she took items from his apartment, used his ATM and EBT cards to withdraw money and purchase items, and cashed his federal student loan check without his permission and while he was in custody. On this record, reasonable jurors would not have received a significantly different impression of Rodriguez's credibility had defendant been permitted to cross-examine her concerning the pending federal case.

Finally, we need not consider whether the trial court erred in refusing to allow defendant to ask Rodriguez whether the probation officer visited her at her mother's home because any potential error was harmless. Defendant asserts such evidence was relevant to the issue of cohabitation. The trial court, however, allowed defendant to introduce evidence Rodriguez gave probation her mother's address. Given this evidence and the entire record on appeal, any possible error in precluding defendant from questioning Rodriguez concerning where the probation visits actually occurred was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 22 [17

L.Ed.2d 705, 709-710]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

MURRAY, J.